IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 100

PETER KLOPFER,

Petitioner,

—v.—

STATE OF NORTH CAROLINA,

Respondent.

MOTION OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NORTH CAROLINA FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

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STATE OF NORTH CAROLINA,

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

The American Civil Liberties Union and the American Civil Liberties Union of North Carolina respectfully move for leave to file a brief as *amici curiae* in this case.

Petitioner has consented in writing to the filing of this brief. The State of North Carolina, respondent, following what the applicant understands to be the routine practice of the Attorney General's office, has refrained from either consenting or objecting to the filing of such brief.

The interest of the American Civil Liberties Union is twofold: the general interest it holds as a civil liberties organization, and, more specifically, a belief that justice requires that the decision in this case be reversed.

Since its founding in 1920, the American Civil Liberties Union has sought to prevent and to redress violations of civil liberties protected by the Constitution through litiga-

tion, educational programs, public statements and petitions to the Government. Its intention has never been to further the interest of any special group, but rather to defend the civil liberties of all persons equally. The American Civil Liberties Union hopes that an argument presented by an organization both experienced and specially concerned with maintaining constitutionally guaranteed liberties may be of aid to the Court in its adjudication of the sensitive issues raised by this case.

Amici move for leave to file this brief for two specific reasons:

a. The harm resulting to petitioner and to other criminal defendants whose prosecutions may be indefinitely continued by the granting of *nol. pros.* with leave, and similar devices, warrants the fullest possible exposition of the serious and novel constitutional issues raised by these practices.

b. The unqualified availability of *nol. pros.* with leave, by its presence, its broad application by the solicitor, and its excessively permissive use by the State Supreme Court, is a substantial threat to the free expression of unpopular beliefs and ideas. This issue demands extensive analysis.

We fear that the parties may not fully address themselves to the above issues. We believe our brief will aid the Court by emphasizing these aspects of the litigation. If our arguments were accepted, they would be dispositive of this case.

Respectfully submitted,

MELVIN L. WULF
Attorney for Movant

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STATE OF NORTH CAROLINA,

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NORTH CAROLINA CIVIL LIBERTIES UNION, *AMICI CURIAE*

Interest of the *Amici*

We respectfully refer the Court to the preceding motion for leave to file this brief wherein the interest of *amici curiae* is set forth.

Questions Presented

1. May a State through its criminal procedure empower the solicitor to suspend a criminal proceeding without explanation or cause and to reinstitute the prosecution at any time, without providing any standards for the solicitor to follow, and thus deny to the accused a speedy trial of the charges pending against him in violation of the Sixth

Amendment as made applicable to the States through the Fourteenth Amendment to the Constitution?

2. May a State employ a procedure in a criminal trial the effect of which is necessarily to punish and to stigmatize a person indirectly for that which the State could not otherwise punish him, thus denying Petitioner due process of law?

3. May a State through its criminal procedure give its solicitor the absolute discretion to suspend or try a criminal offense once the indictment has issued, when the necessary effect of such power may discourage or stifle the free expression of unpopular ideas and beliefs protected by the First Amendment?

Statement of the Case

On February 24, 1964, petitioner, Professor Peter Klopfer, was indicted for criminal trespass, punishable by imprisonment for as long as two years. The trespass was alleged to have taken place when he and others, seeking nondiscriminatory service in a place of public accommodation, sought access to the cafe premises of Austin Watts, Chapel Hill, North Carolina. Petitioner pleaded "not guilty" at his trial in March, 1964. After due deliberation upon all the evidence, the jury was unable to reach a verdict. Thereupon the Court withdrew a juror and entered an order of mistrial. Petitioner's case was not retried during any subsequent Criminal Session that year.

Shortly thereafter, but one year after the original mistrial, the solicitor advised petitioner's attorney of his intention to move the Court for a *nol. pros.* with leave. There-

upon, petitioner, through his attorney, opposed in open court at the April, 1965, Criminal Session the entry of such motion in petitioner's case. The solicitor then stated that he wished to retain petitioner's case in its trial docket status.

Petitioner's case was not listed for trial during the August, 1965, Criminal Session. The Court, in response to petitioner's motion seeking ascertainment of the status of his case, inquired into the matter in open court. At that time the solicitor moved the Court for a *nol. pros.* with leave, but without explanation as to why it was appropriate to continue its case. The motion was granted. Petitioner objected and took exception to the entry.

On appeal to the North Carolina Supreme Court the entry of *nol. pros.* with leave was affirmed, *State* v. *Klopfer,* 145 S. E. 2d 909 (1966).

ARGUMENT

I.

The *nol. pros.* with leave, giving the solicitor the naked power to suspend a criminal prosecution or to reinstitute said prosecution at any time thereafter, denies petitioner his right to a speedy trial of the charges pending against him in violation of the Sixth Amendment as made applicable to the States through the Fourteenth Amendment to the Constitution.

a. The *Nol. Pros.* With Leave: Its Nature and Its Use.

North Carolina G. S. 15-175 is the State's *nol. pros.* statute. However, it is not clear either from the record or from the opinion of the North Carolina Supreme Court whether the State, in petitioner's case, invoked this statute or some common law legacy. In either case, the effect is the same. As judicially interpreted, this procedure gives local solicitors, on behalf of the State, practically unlimited power to determine the disposition and course of pending criminal prosecutions. Once an indictment has issued, the solicitor has the authority to move for entry of *nol. pros.* with leave, without any showing of cause. Upon the granting of the motion by the Court, the solicitor then is empowered either to forestall trial of the cause for however long he wishes or to reinstitute prosecution at any time thereafter. No standards are imposed upon his discretion either by statute or by case law. *State* v. *Thompson*, 10 N. C. 613 (1825); *State* v. *Buchanen*, 23 N. C. 59½ (1840); *State* v. *Thornton*, 35 N. C. 258 (1852); *State* v. *Moody*, 69 N. C. 529 (1893); *State* v. *Furmage*, 250 N. C. 623, 109 S. E. 2d 563 (1959). The solicitor is equally free, once *nol. pros.* with

leave has been entered, to reinstitute the prosecution. He does not have to show cause; he need only apply to the clerk of the court to have a capias issued as a matter of right. *Wilkinson* v. *Wilkinson,* 159 N. C. 265, 266-267, 74 S. E. 740, 741 (1912); *State* v. *Klopfer,* 145 S. E. 2d 909, 910 (1966).

In this critical regard, a *nol. pros.* with leave is significantly different from a *nol. pros.* [without leave] which requires that the trial court first consent before a long delayed prosecution can be reinstated and the defendant made to stand trial. While even the *nol. pros.* [without leave] may in practice prejudice the accused because reinstatement of trial is "usually and properly left to the discretion of the Solicitor," still the exercise of that discretion is within the control of the court as a matter of law. *State* v. *Moody,* 69 N. C. 529 (1893); *State* v. *Buchanen,* 23 N. C. 59 (1840); *State* v. *Thompson,* 10 N. C. 613 (1825). Before an accused can be arrested and brought to trial on a stale indictment in such cases, a capias must first be secured from a court required to determine whether issuance of the capias would constitute an abuse of process under the circumstances. Thus, the State Supreme Court has said the following of the *nol. pros.* [without leave]:

> A *nol. pros.* in a criminal proceeding is nothing but a declaration on the part of the prosecuting officer that he will not at that time prosecute the suit further. Its effect is to put the defendant without day; that is, he is discharged and permitted to leave the court without entering into a recognizance to appear at any other time; but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same

> indictment and he be tried upon it . . . . The abuse to which such power, on the part of the prosecuting officer, is liable, is checked and restrained by the fact that a *capias* after a *nol. pros.* does not issue as a matter of course, upon the mere will and pleasure of the officer, but upon the permission of the court first had; and the court will always see that its process is not abused to the oppression of the citizen. *State* v. *Thornton,* 35 N. C. 258 (1852).

Even this slight safeguard is totally absent with respect to a *nol. pros.* with leave, as the State Supreme Court clearly stated in *Wilkinson* v. *Wilkinson,* 159 N. C. 265, 266-267, 74 S. E. 740, 741 (1912):

> The only difference between a general or unqualified *nol. pros.* and one "with leave" is that in the latter case the leave to issue a capias upon the same bill is given by the court in advance, instead of upon a special application made afterwards. . . . .[I]n both the prisoner is discharged without day . . . In both he can be taken upon a fresh capias, in one by special order, and in the other under the general leave to issue.

The susceptibility of the defendant to re-arrest on a stale indictment without judicial intervention under a *nol. pros.* with leave was expressly acknowledged in petitioner's own case when the State Supreme Court said:

> When a *nolle prosequi* is entered there can be no trial without a further move by the prosecution. The further move must have the sanction of the court. When a *nolle prosequi* is entered the case may be restored to the trial docket when ordered by the judge upon

> the solicitor's application. When a *nolle prósequi with leave* is entered, the consent of the court is implied in the order and the solicitor [without application to the court] may have the case restored for trial. *State* v. *Klopfer,* 266 N. C. 349, 145 S. E. 2d 909, 910 (1966).

It thus is clear that the *nol. pros.* with leave procedure permits the solicitor to control the aftermath of a pending criminal indictment without ever seeking leave of court and without being accountable to a judicial officer.

If the solicitor reinstitutes prosecution of a trial that has been halted under the *nol. pros.* with leave procedure, he may do so at any time, however remote from the date of the indictment, without running afoul the two year statute of limitations generally applicable to misdemeanors. N. C. Gen. Stat. 15-1. When an indictment first issues, the statute of limitations stops running. It does not begin running again when the *nol. pros.* with leave is entered, but remains suspended indefinitely. *State* v. *Williams,* 151 N. C. 660, 65 S. E. 908 (1909).

Not only does the *nol. pros.* with leave procedure enable the solicitor to delay or to bar prosecution indefinitely, but the criminal defendant, under indictment for a misdemeanor, is without means to bring his cause to trial to secure his opportunity for exoneration. Unlike the solicitor, he cannot set his case for trial. Nor can he find antidotal relief in either the Constitution or General Statutes of North Carolina. Once the solicitor has suspended the trial by taking a *nol. pros.* with leave, the defendant is without hope of a speedy trial unless the solicitor promptly changes his mind and decides to reinstate the prosecution. The

fortune of the defendant thus rests entirely with the will of the solicitor.

A number of jurisdictions have acknowledged the threats to the fair administration of justice inherent in such procedure as that followed in this case. Forty-three states afford the criminal defendant constitutional guarantee of a speedy trial in all criminal prosecutions. See Appendix 1, 2, post. In addition, nine states guarantee this right by statute. See Appendix 4, post. Beyond these general and only partly efficacious provisions, approximately one-fourth of the states also have seen fit altogether to abolish *nol. pros.* expressly by statute, or have greatly reduced its entry by the prosecution. See Appendix 5, post. Several states have placed the sole power for its entry in the court. See Appendix 6, post. And several other states do not mention any *nol. pros.* procedure whatever in their statutory schemes. See Appendix 8, post. Among the fifty states, only North Carolina currently permits its local solicitors freely to use the *nol. pros.* with leave. No other state includes the *nol. pros.* with leave in its criminal procedure.

At the same time, North Carolina has no operative guarantee of a speedy trial in its constitution to offset the broad power given solicitors by the *nol. pros.* with leave procedure. To be sure, the state constitution contains general language that justice shall be administered "without sale, denial, or delay" (N. C. Const. art. 1, §35), but this language has never been interpreted by its courts to require a prosecutor to indicate why *nol. pros.* with leave would not deny or delay justice in a particular case. See Appendix 3, post. It has never been used to limit the use of *nol. pros.* with leave. The only meaningful protection against delay that North Caro-

lina affords its criminally accused is found in N. C. Gen. Stat. 15-10, applicable only to incarcerated felons. See Appendix 4, post. The State offers no relief from delay, however unreasonable, to one who has been indicted for a misdemeanor.

Neither does the state offer any justification for delay, as this case illustrates. The *nol. pros.* with leave in this case was granted over petitioner's strenuous objection, without explanation by the court or the solicitor. Indeed, the State Supreme Court was unable to ascertain any reason from the record. It speculated only that the solicitor "may have concluded that another go at it *would not be worth the time and expense of another effort.*" *State* v. *Klopfer*, 145 S. E. 2d 909, 910 (1966). (Emphasis added.) It is impossible to understand how this view of the case justifies anything other than a dismissal of the prosecution, rather than a wholly arbitrary subordination of petitioner's right to a speedy trial.

Such a condition of state law exerts very forceful pressure upon every criminal defendant in a misdemeanor prosecution who would otherwise plead "not guilty" and immediately join issue, knowing full well that whatever the outcome he could eventually resume his normal life, free from anxiety and future jeopardy. But the defendant who must frame his plea under the threat that the prosecutor may indefinitely delay the trial of his cause through the discretionary *nol. pros.* with leave, lacks this measure of opportunity and security. Knowing that he has no assurance of a prompt trial and that he will be subject to prosecution at any time in the future, he is under extreme pressure to forgo his cause and to plead guilty. If the state's procedure cannot guarantee the security of a speedy trial, even

upon minimum standards of promptness, and in its stead vests such power in the solicitor as does the *nol. pros.* with leave procedure, then the criminal defendant is simply deprived of his right to defend himself without jeopardizing his job, his family, his standing and reputation in the community.

This is the plight of petitioner who has been two years under indictment. He remains "neither innocent nor guilty," but without doubt, to all the community, accused and indicted. The solicitor has denied Professor Klopfer a speedy trial upon the charges—an opportunity to establish his innocence, to recover his dignity and to be free of the specter of future prosecution. The solicitor has greatly interfered with petitioner's ability to schedule lecture and speaking tours outside North Carolina in his capacity as Professor of Zoology at Duke University. He has, in effect, snared Professor Klopfer in a web of uncertainty. Of only one thing can petitioner now be sure: he will remain in jeopardy for the rest of his life, subject indefinitely to the power of the solicitor or his successors to reinstate prosecution.

b. The Right to a Speedy Trial: History and Policy Considerations.

The right to a speedy trial is of long standing. Its basic nature is disclosed by its deep roots in the early common law. It was first given effect in the Magna Carta where it was written "To no one will we sell, to no one deny or delay, right or justice." This provision was subsequently implemented by special writs of jail delivery and later by commissions of jail delivery under which special judges emptied the jails twice each year and either convicted and

punished the prisoners or set them free. II COKE INST. 43. In 1679 Parliament passed the Habeas Corpus Act, 31 Car. II, Ch. 2, which required that prisoners indicted for treason or felony be tried at the next sessions or be released on bail. That Act, which Blackstone called "the Bulwark of the British Constitution", 4 COMMENTARIES 438, was still cherished by the British people at the time our Constitution was adopted, Hale's HISTORY OF THE COMMON LAW, p. 87 et seq. (5th ed.) and by American patriots and lawyers nurtured on Blackstone. Some believed that the right to a speedy trial and other similar rights were so clearly a part of our "liberty" that no Bill of Rights was necessary. THE FEDERALIST, No. 84. But to be sure that these and other fundamental rights would be preserved to the People, the first nine Amendments were added to the Constitution; and the right to a speedy trial was given first place among the rights in the Sixth Amendment. In time, most of the states adopted the language or policy of the Sixth Amendment into their own constitutional or statutory schemes. See Appendix 1, 2, 4, 10, post.

An examination of these early acts and of the state court decisions which interpreted them helps to elucidate what those who ratified the Sixth Amendment meant by the term "speedy trial." Generally, the early acts provided that the trial of a criminal indictment had to be held within a specified period of time or that the indictment had to be dismissed. See Appendix 11, post. In addition, many courts felt that the indictment should be dismissed whenever the delay was substantial or unreasonable or prejudicial to the accused regardless of the cause of that delay. See Appendix 12, post. Other courts, agreeing with the basic premise set out above, denied dismissal of the indictment only if the

accused had caused the delay himself. See Appendix 12, post. Cooley aptly expressed the underlying policies and apprehension felt by the ratifiers of the Sixth Amendment when he wrote:

> Again, it is required that the trial be *speedy;* and here also the injunction is addressed to the sense of justice and sound judgment of the court. In this country, where officers are specially appointed or elected to represent the people in these prosecutions, their position gives them an immense power for oppression; and it is to be feared that they do not always sufficiently appreciate the responsibility, and wield the power with due regard to the legal rights and privileges of the accused. When a person charged with a crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable except that which is necessary for proper preparation and to secure the attendance of witnesses. . . . CONSTITUTIONAL LIMITATIONS (8th ed.), Vol. 1, p. 645 et seq.

Most of the federal cases have gone off on the ground that the accused waives his right to a speedy trial unless he specifically demands it in a timely fashion. See Appendix 13, post. However, a great majority of federal cases have recognized that if a defendant does not waive his right to a speedy trial by failing to ask for it, he may, in a proper case, be entitled to a discharge because of unreasonable delay in bringing his case to trial. See Appendix 14, post.

The policies underlying the right to a speedy trial are now, as they were in Blackstone's England, the embodiment of realistic concern for the rights of the accused in a free

society. This policy has two equally significant aspects: the desire to protect the individual from the indignity, harassment and anxiety of an unresolved arrest and indictment, *Ex parte Pickerill*, 44 F. Supp. 741, 742 (N. D. Tex. 1942); and the grave concern that the individual, because of delay, will be denied the fair administration of justice. This latter aspect of the policy acknowledges that the value of a speedy trial is that it best preserves to the defendant the means of proving his case. *United States* v. *Ewell*, 383 U. S. 116 (1966); *Fouts* v. *United States*, 253 F. 2d 215, 217 (6th Cir. 1958); *United States* v. *Chase*, 135 F. Supp. 230, 232 (E. D. Ill. 1955). The United States Supreme Court recently articulated this concern for the criminal defendant when it stated:

> This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, *to minimize anxiety and concern accompanying public accusation and to limit the possibility that long delay will impair the ability of an accused to defend himself.* *United States* v. *Ewell, supra*, at page 120. (Emphasis supplied.)

While the Court speaks of the need to prevent undue or oppressive incarceration prior to trial as one reason why there is a need for such constitutional protection, the Sixth Amendment is not so limited in its concern for the individual. When a criminal defendant pleads that he has been denied a speedy trial, it is not necessary for him to stipulate that he is incarcerated or even that he has been or will be demonstrably prejudiced by the delay. *United States* v. *Lustman*, 258 F. 2d 475, 477 (2d Cir. 1958); cert. denied 358 U. S. 880 (1958); *Ex parte Pickerill, supra*, at page 472.

To be sure, prior incarceration represents only one aspect of Sixth Amendment "speedy trial" protection. It seems obviously consistent with the Sixth Amendment's policy of protecting the criminally accused that the allegation of a large quantum of genuine personal anxiety and the possibility of the erosion of the opportunity for exoneration should offset the fact that the accused is not incarcerated. *United States* v. *Fay*, 313 F. 2d 620, 623 (2d Cir. 1963). One is not less subject to the disabilities attending a long delay merely because he is not held in custody. Of equal importance is the fact that he is subject to anxiety and concern over the possible disposition of the indictment pending against him, and that he must continue to entertain grave doubts about his future security. To require that the accused be incarcerated to raise the issue of delay would place an intolerable burden upon the exercise of the constitutional right to a speedy trial by making it unavailable to all defendants whose indictments were *nol. prossed* against their will or who had committed a bailable offense and who had chosen bail rather than jail. Such restrictive application of the Sixth Amendment is not consistent with the all-embracing protection afforded by this Constitutional provision. The right of a speedy trial is far more inclusive than the doctrine of prior incarceration would admit:

> A prisoner, a convict, one on bond, *or any and every person who is charged with an offense,* has a legal right to a speedy settlement of the charge that is asserted against him. *Ex parte Pickerill, supra,* at page 742. (Emphasis supplied.)

To require an accused to remain in jail, especially in a situation where he would not be permitted to do so because his case had been *nol. prossed,* would subvert the Constitutional right to a speedy trial and undermine the several policies of the Sixth Amendment.

The importance of the speedy trial of criminal offenses in a democratic society derives not only from its need to protect the accused, but equally to protect the public order. The societal interest in security demands speedy trial, for this facilitates both effective prosecution of criminals and greater deterrence to potential criminals.

c. The Right to a Speedy Trial: Its Application to the States Through the Fourteenth Amendment.

Federal courts have sometimes suggested that the Sixth Amendment guarantee to a speedy trial is not directly or fully applicable to the states through the Due Process Clause of the Fourteenth Amendment. *In re Sawyer's Petition,* 229 F. 2d 805, 812 (7th Cir. 1956). This does not mean, however, that the state defendant is entirely without the equivalent of specific Sixth Amendment protection. Language bearing upon this issue points up that the Fourteenth Amendment protects the state defendant against the denial of a speedy trial to the extent that such denial is inconsistent with fundamental due process. *Mattoon* v. *Rhay,* 313 F. 2d 683, 684-685 (9th Cir. 1963); *Odell* v. *Burke,* 281 F. 2d 782, 787 (7th Cir. 1960); *Hastings* v. *McLeod,* 261 F. 2d 627 (9th Cir. 1958) (per curiam); *New York* v. *Fay,* 215 F. Supp. 653, 655 (S. D. N. Y. 1963); *Gordon* v. *Overlade,* 135 F. Supp. 577, 578 (N. D. Ind. 1958). In recent years, the Supreme Court, demonstrating forthright concern for the rights of the accused, has broad-

ened that understanding of due process. To that end the Court has brought within the scope of Fourteenth Amendment protection those safeguards in the first nine Amendments fundamental to " . . . the very essence of a scheme of ordered liberty." *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937). Speaking for the Court in *Gideon* v. *Wainwright,* 372 U. S. 335, 341 (1963), Mr. Justice Black has pointed out that there are " . . . ample precedents for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment." The Court has more recently sharpened this point, emphasizing that " . . . since [*Gideon*] it no longer can broadly be said that the Sixth Amendment does not apply to state courts." *Pointer* v. *Texas,* 380 U. S. 400, 406 (1965). To remove any doubts about where the Court stands on this issue, it has observed: " . . . [i]n the light of *Gideon, Malloy* [*Malloy* v. *Hogan,* 378 U. S. 1 (1964)], and other cases cited in these opinions . . . the statements made . . . that the Sixth Amendment does not apply to the states *can no longer be regarded as the law* [emphasis added]. *Pointer* v. *Texas,* 380 U. S. 400, 406 (1965).

It has been nearly three decades since this Court reminded us that "the Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." *Johnson* v. *Zerbst,* 304 U. S. 458 (1938). In *Pointer,* the Court was at pains to acknowledge that justice must also be done by the states (at p. 403):

> The Sixth Amendment is a part of what is called our Bill of Rights. In *Gideon* v. *Wainwright,* supra, in

> which this Court held that the Sixth Amendment's right to the assistance of counsel is obligatory upon the States, we did so on the ground that 'a provision of the Bill of Rights which is fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment.

Surely there is no basis for holding that a speedy trial is less fundamental and less essential to a fair trial. Surely it would be an unprincipled anomaly to hold that the due process clause of the Fourteenth Amendment holds the states to every other Sixth Amendment standard of fundamental fairness, but not to this one. And without question, the protection of the Sixth Amendment is subverted when a state may indefinitely delay a trial without reason, until the efficacy of the accused's defense has been debilitated by the ravages of time and he has been obliquely punished by the stigma of his arrest and indictment. Such deliberate procrastination undercuts the possibility of having a fair trial, having repose from the threat of prosecution, and having an opportunity for exoneration.

The *nol. pros.* with leave procedure, which in practice and in this case grants the solicitor the unfettered power to delay a trial indefinitely, and which, in fact, has permitted the delay of petitioner's trial for two years, will not wash in the wake of standards of fundamental fairness. Due process demands that every accused have a fair trial, which necessitates, as a minimum, as prompt a trial as the fair administration of justice will allow. *Shepard* v. *United States,* 163 F. 2d 974, 976 (8th Cir. 1947). Time does not recognize jurisdictional boundaries. Wherever the situs, the ingredients of a fair trial blend in the same way. Unreasonable delay is inimical to the rights of the

accused wherever the forum. *United States* v. *McWilliams*, 69 F. Supp. 812, 814 (D. D. C. 1946); *United States* v. *Fay*, 313 F. 2d 620, 623 (2d Cir. 1963); *State of Maryland* v. *Kurek*, 233 F. Supp. 431, 432 (D. Md. 1964).

This Court has properly declared that the degree of delay permissible for completion of a prosecution under the Sixth Amendment depends upon a number of circumstances to reconcile the right to a speedy trial with the fair administration of justice. *Pollard* v. *United States*, 352 U. S. 354, 361 (1957). Whether a particular delay has been unreasonable depends essentially upon the interplay of four factors: the length of the delay; the reason for the delay; the prejudice to the accused; and waiver by the accused. *United States* v. *Simmons*, 338 F. 2d 804, 807 (2d Cir. 1964).

In the instant case, approximately two years have elapsed since the indictment issued against petitioner. So far as the *nol. pros.* with leave procedure is concerned, it may continue indefinitely—entirely at the discretion of the solicitor. *Wilkinson* v. *Wilkinson*, 159 N. C. 265, 266-267, 74 S. E. 740, 741 (1912).

The State failed to suggest any reason for further delay of the trial at the time it secured the *nol. pros.* with leave. In view of the fact that one trial on the indictment had already been completed, that the alleged incident occurred locally, that the witnesses were few in number, close at hand, and readily available (they had already testified in Professor Klopfer's first trial and repeatedly, in four companion cases), it is not surprising that the solicitor could express no reason to continue this proceeding. The North Carolina Supreme Court could only speculate that the solicitor "may have concluded that another go at it would not

be worth the time and expense of another effort." *State* v. *Klopfer*, 145 S. E. 2d 909, 910 (1966). But far from providing any reason whatsoever for indefinitely continuing the prosecution, this speculation suggests only that the prosecution should have been dismissed. Thus, the prosecutor failed to state a reason to justify further delay and the State Supreme Court was frankly unable even to hypothesize an appropriate justification.

We respectfully submit, however, that an examination of the facts and setting of this prosecution tend convincingly to establish that the actual reason for the prosecutor's action may have been highly improper and vindictive, and that it had nothing whatever to do with the fair administration of justice. Petitioner was indicted for criminal trespass, having peacefully sought service in a place of public accommodation. His trial concluded indecisively shortly before Congress adopted the Civil Rights Act of 1964, including of course the sections applicable to places of public accommodation. 78 Stat. 241, Tit. II, §201 (b) (2). Those sections were upheld by this Court in *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964) and *Katzenbach* v. *McClung*, 379 U. S. 294 (1964). On December 14, 1964, this Court interpreted the Civil Rights Act as protecting peaceful efforts to secure service in places of public accommodations, and as forbidding attempts to punish such efforts through prosecution and harassment under state anti-trespass laws. *Hamm* v. *City of Rock Hill*, 379 U. S. 306 (1964). On March 5, 1965, the United States Court of Appeals for the Fifth Judicial Circuit held that state trespass prosecutions forbidden by the Civil Rights Act as interpreted in *Hamm* were removable to appropriate federal district courts, and it held further that the district

court should order any such prosecutions to be dismissed once they had been appropriately removed. *Rachel* v. *Georgia*, 342 F. 2d 336 (5th Cir. 1965), *aff'd*, 86 S. Ct. 1783 (1966). A little more than a month after the circuit court decision in *Rachel* and about four months after this Court's decision in *Hamm*, the solicitor in this case served notice on petitioner that he intended not to reinstate the prosecution but to secure a *nol. pros.* with leave! Thus, the solicitor "rescued" himself from having his case dismissed upon removal to a federal district court, circumventing the Civil Rights Act and the removal statute (28 U. S. C. §1443(1)), and temporarily succeeding in an enterprise which left the petitioner with "the presence of an unresolved criminal charge [which] may hang over [his] head . . . for years" or for the rest of his life. *City of Greenwood, Mississippi* v. *Peacock*, 86 S. Ct. 1800, 1821 (1966) (dissenting opinion). We say "*temporarily* succeeding," rather than "permanently succeeding," solely in reliance upon the Constitution and the wisdom of this Court.

There is no way fully to measure the prejudice sustained by Professor Klopfer, whether in terms of anxiety respecting the specter of future prosecution, community stigma from an arrest and indictment he has had no reasonable opportunity to overcome, prejudice to his career, lost ability to defend himself, or disillusionment with the fair administration of justice. There is no exact way of measuring the future effect on his ability successfully to exercise rights under the Constitution and the laws of the United States, knowing that he may be harassed by arrests followed by *nol. pros.* with leave. There is no way accurately to measure the prejudice to others in North Carolina who know of Professor Klopfer's experience, and

who must surely take it into account in judging how safely they may rely upon rights established by the Constitution, Acts of Congress, and the decisions of this Court. All that can be said with certainty is that the prejudice will increase with the passing of time, exactly as the solicitor's lack of any proper justification for delay becomes ever clearer.

Finally, we note that petitioner did not waive his right to a speedy trial. To the contrary, the record demonstrates that his counsel made timely objection and took express exception to the entry of *nol. pros.* with leave (R. 11-12).

Viewed alone, any one of these factors might not amount to unreasonable delay. But as an aggregate, they easily reach due process dimensions.

II.

The *nol. pros.* with leave violates due process in operating to punish the petitioner in the absence of a fundamentally fair trial.

Due process requires not merely that criminal trials must be conducted free of fundamental error, but that the accused must be given a reasonable opportunity to end the stigma and disabilities of arrest and indictment by establishing his innocence. Due process assures the accused the affirmative right to have a fair trial take place. It is obvious that the significant right to establish one's innocence may be eroded in direct proportion to the lapse of time between his arrest and his trial. Just as the ravages of time adversely affect the availability of the State's evidence and the State's witnesses against him, so they equally affect his ability to secure exoneration against the criminal charge as well as against the prospect of convic-

tion. After sufficient time has gone by to enable the accused and the State to prepare for trial, further delay operates to their mutual disadvantage by atrophy of their evidence. The result is to increase the likelihood that no meaningful trial can be held and, correspondingly, that the accused will have to live out his life subjected to the disabilities of an unresolved record of criminal arrest and indictment. Without the aid of this Court, petitioner is virtually certain to endure such oblique punishment. He has no means pursuant to any procedure in North Carolina either to bring his case to trial or to secure a dismissal of the indictment. No remedy exists to offset the solicitor's discretion to delay the trial indefinitely. Beyond that, the solicitor has failed to suggest any reason why further delay beyond two years is necessary or even consistent with any desire by him to prosecute the case. And beyond this, it is clear that but for the prosecution's power to hold the accused in limbo for the rest of his life, the accused would in fact already have been vindicated at law.

As previously noted, petitioner was indicted for criminal trespass for having peacefully sought service in a place of public accommodation plainly within the meaning of the Civil Rights Act of 1964. 78 Stat. 241, Tit. II, §201(b)(2). Pursuant to this Court's decision in *Hamm* v. *City of Rock Hill*, 379 U. S. 306 (1964), he could not now be convicted of the offense for which he stands accused and indicted. The *Hamm* decision, moreover, occurred before the solicitor obtained a *nol. pros.* with leave in this case. It was therefore clear at the time not only that no additional time was required to prepare adequately the prosecution of this case which had already been tried once (before the *Hamm* decision), but that no subsequent prosecution could succeed.

The effect of the *nol. pros.* with leave is therefore not only to deprive the accused of his opportunity to establish his innocence and to resolve the record of his arrest and indictment, but to deprive him of the certainty of vindication. The net effect of the proceedings below is to punish the petitioner subliminally through the expedient of an unresolved record of arrest and indictment which he must carry with him for the rest of his life, unless this Court acts.

III.

The *nol. pros.* with leave, granted without reason in this case, represents a continuing *in terrorem* deterrent to the exercise of constitutionally protected rights of speech, assembly, association, and equal protection in North Carolina.

It is no secret that expressions in opposition to racial discrimination are unpopular with much of the white citizenry of the South. North Carolina makes it very easy for its local solicitor to discourage such expression. It has armed him with the discretionary *nol. pros.* with leave, thus empowering the solicitor to suspend indefinitely the trial of one who, such as Professor Klopfer, has been arrested and indicted while engaging in a locally unpopular, though constitutionally protected, form of conduct. The State also has empowered its solicitor, through this same procedure, to cause the protestant to be again arrested upon the same indictment as often as the solicitor wills, each time putting the accused to the burden of arranging bond and preparing his defense. It is not difficult to foresee that if petitioner again engages in a racial protest or, for that matter, in any form of expression or conduct disapproved of by the State or the solicitor, he might well be

re-arrested upon the indictment now pending, once, twice, or many times, and gravely inconvenienced and embarrassed.

In light of Professor Klopfer's position as a member of a university faculty, such harassment would present a grave threat, jeopardizing his career as well as his standing and reputation in the community. The effect, therefore, is to force petitioner to choose between his career and effectively expressing his dissatisfaction with racial segregation. Neither the State nor its solicitor has the right to force so unconscionable a choice on one who would otherwise engage in a form of unpopular expression, unless the State can demonstrate some overriding, compelling interest. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1958); *Bates* v. *City of Little Rock,* 361 U. S. 516 (1960). North Carolina's solicitor has failed in petitioner's case to show any State interest to be preserved by permitting petitioner's indictment to continue. It is especially doubtful in light of the effect that *Hamm* and the Civil Rights Act of 1964 would have upon a conviction that any reason to continue the indictment exists other than the deterrent effect it is bound to have upon petitioner's future conduct.

To the extent that the *nol. pros.* with leave empowers the solicitor to deter petitioner from again engaging in a racial protest, this procedure does not pass constitutional muster. If petitioner is ever again to feel free to express an unpopular belief in North Carolina, the indictment pending against him must be dismissed.

CONCLUSION

To safeguard petitioner's right to a fair and speedy trial as well as his right to express unpopular beliefs, this Court should dismiss the indictment pending against petitioner pursuant to the discretionary *nol. pros.* with leave.

Respectfully submitted,

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The attorneys for *amici* acknowledge the invaluable assistance of Mr. Steven Roth, a student at the Duke Law School.

APPENDIX

1. Thirty-eight constitutions provide, like the Sixth Amendment, that the accused shall enjoy the right to a speedy and public trial in all criminal prosecutions. Ala. Const. art. 1, §6; Alaska Const. art. 1, §11; Ariz. Const. art. 2, §24; Ark. Const. art. 2, §10; Cal. Const. art. 1, §13; Colo. Const. art. II, sec. 16; Conn. Const. art. 1, §9; Del. Const. art. 1, §7; Fla. Const. DR sec. 11; Ga. Const. art. 1, §2-105; Idaho Const. art. 1, §13; Ill. Const. art. 2, §9; Iowa Const. art. 1, §10; Kan. Const. B. of R., §10; Ky. Const. §11; La. Const. art. 1, §9; Me. Const. art. 1, §6; Md. Const. D. R. art. 21; Mich. Const. 1963 art. 1, §20; Minn. Const. art. 1, §6; Miss. Const. art. 3, §26; Mo. Const. art. 1, §18(a); Mont. Const. art. 3, §15; Neb. Const. art. 1, §11; N. J. Const. art. 1, par. 10; N. D. Const. art. 1, §13; Ohio Const. art. 1, §10; Okla. Const. art. 2, §20; Pa. Const. art. 1, §9; R. I. Const. art. 1, §10; S. C. Const. art. 1, §18; Tenn. Const. art. 1, §9; Tex. Const. art. 1, §10; Utah Const. art. 1, §12; Va. Const. art. 1, §8; Vt. Const. ch. I, art. 10; Wis. Const. art. 1, §7; Wyo. Const. art. 1, §10.

2. Six constitutions, not specifically guaranteeing the accused a speedy and public trial, state that justice shall be administered speedily and without delay. This, too, has been construed to afford the accused the right to a speedy trial.

   Ariz. Const. art. 2, §11 (But see appendix 1, supra); Ind. Const. art. 1, §12; Kan. Const. B. of R., §18 (But see Appendix 1, supra); Ore. Const. art. 1, §10; Wash. Const. art. 1, §10; W. Va. Const. art. III, §14.

3. Six states have no constitutional guarantee of a speedy trial.

   Hawaii, Massachusetts, Nevada, New Hampshire, New York, North Carolina.

   Three of these states have language in their constitutions similar to that of the Indiana constitution. (Appendix 2, Supra). Mass. Const. pt. 1, Art. XII, §12; N. H. Const. pt. 1, art. 14; N. C. Const. art. 1, §35. But thus far there have been no judicial decisions interpreting this to guarantee the right to a speedy trial.

4. Eleven states provide by statute that the accused shall enjoy the right to a speedy trial.

   Ariz. Rev. Stat. Ann. art. 3, §13-161; Ark. Stat. Ann. tit. 43, §1703; Ga. Code Ann. ch. 27-6, §21-601; Idaho Code tit. 19, §3501; Ill. Rev. Stat. 1965 tit. 28, §103-5; Kan. Stat. Ann. §62-1431 et seq.; Ann. Laws of Mass. tit. 277, §72; Mo. Stat. Ann. §545.890; Nev. Rev. Stat. §169.160; N. C. Gen. Stat. 15-10 (applying to felony offenses only); Okla. Stat. Ann. tit. 22, §13; Code of Law of S. C. tit. 17, §509 (felony); §510 (misdemeanor).

5. Approximately one-fourth of the States have abolished *nol. pros.* expressly by statute or have greatly restricted its entry.

   California, Cal. Pen. Code §1386: "The entry of a nolle prosequi is abolished, and neither the attorney-general nor the district attorney can discontinue or abandon a prosecution for a public offense, except as provided in the last section." (i.e., §1387: "An order for the dismissal of the action, as provided in this chapter, is a bar to any other prosecution for the same offense if

it is a misdemeanor, but it is not a bar if the offense is a felony.").

Idaho, Idaho Code Ann. 19-3506: "The entry of a nolle prosequi is abolished, and neither the attorney-general nor the prosecuting attorney can discontinue or abandon a prosecution for a public offense except as provided in the last section."

Iowa, Iowa Code §795-5 (by implication): "The court upon its own motion or the application of the county attorney, in the furtherance of justice, may order the dismissal of any pending criminal prosecution, the reasons therefor being stated and the order entered of record, and no such prosecution shall be discontinued or abandoned in any other manner. Such a dismissal is a bar to another prosecution for the same offense if it is a misdemeanor; but it is not a bar if the offense charged be a felony."

Minnesota, Minn. Stat. §631.21 (by implication): "The court may, either of its own motion or upon the application of the prosecuting officer, and in furtherance of justice, order any criminal action, whether prosecuted upon indictment, information or complaint, to be dismissed; but in that case the reasons for the dismissal shall be set forth in the order, and entered upon the minutes, and the recommendations of the prosecuting officer in reference thereto, with his reasons therefor, shall be stated in writing and filed as a public record with the official files of the case."

Montana, Mont. Rev. Code Ann. §94-9506: "The entry of the nolle prosequi is abolished, and neither the attorney-general nor the county attorney can discon-

tinue or abandon the prosecution of a public offense, except as provided in the last section." (i.e., §94-9507: "An order for the dismissal of an action, as provided in this chapter, is a bar to any other prosecution for the same offense if it is a misdemeanor, but it is not a bar if the offense is a felony.").

Nevada, Nev. Rev. Stat. §178-515: "Neither the attorney-general nor the district attorney shall hereafter discontinue or abandon a prosecution for a public offense, except as provided in NRS 178.510." (Note: §178.510 provides for the dismissal of an action on the motion of the prosecuting attorney or the court; 178.520 provides that such a dismissal is a bar to further prosecution for the same offense if it is a misdemeanor.).

New York, N. Y. Crim. Code §672: "The entry of a nolle prosequi is abolished, and neither the attorney-general, nor the district attorney, can discontinue or abandon a prosecution for a crime, except as provided in the last section."

North Dakota, N. D. Rev. Code §29-1805: "The entry of a nolle prosequi is abandoned in this state, and the state's attorney cannot discontinue or abandon a prosecution for a public offense, except as provided in section 29-18-04." (§29-18-04 provides that the court or the state's attorney upon application to the court, may, upon its own motion or upon granting the state's attorney's application, dismiss a prosecution. The reasons for the dismissal must be set forth in the minutes. However, §29-18-06 provides that such a dismissal is not a bar to further prosecution for the same offense.).

Oklahoma, Okla. Stat. tit. 22, §816: "The entry of a

nolle prosequi is abolished, and the county attorney cannot discontinue or abandon a prosecution for a public offense, except as provided in the last section." (i.e., §§815 and 817. The language of these two sections is identical with the language of N. D. Rev. Code §§29-18-04 and 29-18-06, supra.).

Oregon, Ore. Rev. Stat. §134.160: "The entry of a nolle prosequi is abolished, and the district attorney cannot discontinue or abandon a prosecution for a crime, except as provided in ORS 134.150." (Note: ORS 134.150 provides for a dismissal by the court; ORS 134.170 provides that such a dismissal is a bar to further prosecution for the same offense if it is a misdemeanor, but is not a bar if it is a felony.).

South Dakota, S. D. Rev. Stat. 34.2205: "The entry of a nolle prosequi is abolished, and the state's attorney cannot discontinue a prosecution for a public offense, except as provided in section 34.2204."

Utah, Utah Code Ann. §77-51-5: "No prosecuting attorney can discontinue or abandon a prosecution for a public offense, except as provided in the next preceding section." (i.e., §77-51-4 provides that the court may dismiss a prosecution upon its own motion or upon the application of a prosecuting attorney; §77-51-6 provides that such a dismissal is a bar to further prosecution of a misdemeanor, but is not a bar to the further prosecution of a felony.)

6. Sixteen states have placed sole discretion for entry of *nol. pros.* in the court.

Alabama, Ala. Code Ann., tit. 15, §257: "An indictment must not be quashed, dismissed, discontinued or

abandoned without the permission of the court; and such permission must be entered of record."

Arkansas, Ark. Ann. Stat. §43-1230: "No attorney for the State shall enter a nolle prosequi on any indictment, or in any other way discontinue or abandon the same, without the leave of the court in which such indictment is pending being first entered on the minutes."

Colorado, Colo. Rev. Stat. 1963, tit. 39, §7-12: "Hereafter no criminal case pending in any court in this state shall be dismissed or a nolle prosequi therein entered by any district attorney or his deputy, unless upon a motion in open court, and by and with the consent and approval of such court or judge thereof, and such motion shall be supported or accompanied by a statement in writing concisely stating the reasons for such action, and which shall be filed with the record of the particular case and open to the inspection of the public."

Delaware, Del. Supreme Court Rule 48: "(a) The Attorney General may by leave of court file a nolle prosequi of an indictment, information or complaint and the prosecution thereupon shall terminate. Such a nolle prosequi may not be filed during the trial without the consent of the defendant."

Georgia, Ga. Code Ann. §27-1801: "After an examination of the case in open court, and before it has been submitted to the jury, the solicitor general may enter a nolle prosequi with the consent of the court. After the case has been submitted to the jury, a nolle prosequi shall not be entered except by consent of the defendant."

Hawaii, §258-40: "No nolle prosequi shall be entered in a criminal case in a court of record except by consent of the court upon written motion of the prosecuting attorney stating the reasons therefore. The court may deny the motion if it deems such reasons insufficient and if, upon further investigation, it decides that the prosecution shall continue, it may, if in its opinion the interests of justice require it, appoint a special prosecutor to conduct the case and allow him a fee. . . ."

Indiana, Ind. Stat. Ann. §9-910: "No criminal cause shall be dismissed except by order of the court on motion of the prosecuting attorney; and such motion must be in writing, and the reasons therefor must be stated in such motion and read in open court before such order is made; and the mere number of prosecutions against the same person shall not be a reason for dismissing any of such causes." (Note: Though this statute talks of 'dismissal' it is referred to as the State's nolle prosequi statute).

Kentucky, Ky. Rev. Stat. §455.070: "Before a court permits any Commonwealth's or county attorney to dismiss an indictment or enter a nolle prosequi in a case, the Commonwealth's or county attorney shall file a written statement, signed by him, setting forth the reasons for the dismissal or the failure to prosecute. The statement shall be entered upon the order book of the court and an order entered in accordance, therewith."

Maine, Me. Rev. Stat. Ann. tit. 30, ch. 1, §503: "In order to dismiss civil or criminal cases, the county attorney shall indorse upon the back of the writ, indictment or complaint in such cases a written order

of dismissal, together with a statement of reasons for dismissal, and said order of dismissal shall not take effect unless approved in writing by the justice presiding at the term when the said dismissal is made."

Michigan, Mich. Comp. Laws, Code of Crim. Proc., ch. 7, §767.29: "It shall not hereafter be lawful for any prosecuting attorney to enter a nolle prosequi upon any indictment, or in any other way to discontinue or abandon the same, without stating on the record the reasons therefor and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes."

Mississippi, Miss. Code Ann. §2566: "A district attorney shall not compromise any cause or enter a nolle prosequi, either before or after indictment found, without the consent of the court; and, except as provided in the preceding section, it shall not be lawful to dismiss a criminal prosecution at the cost of the defendant, but every cause must be tried, unless dismissed by consent of the court."

Ohio, Ohio Rev. Code Ann., tit. 29, §2941.33: "The prosecuting attorney shall not enter a nolle prosequi in any cause without leave of the court, on good cause shown in open court. A nolle prosequi entered contrary to this section is invalid."

Pennsylvania, Pa. Stat. Ann., tit. 19, §492: "No district attorney shall, in any criminal case whatsoever, enter a nolle prosequi, either before or after a bill found, without the assent of the proper court in writing first had and obtained."

Texas, Code of Crim. Proc. Ann., tit. 7, ch. 4, art. 577: "The district or county attorney may, by permission of the court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge."

Washington, Wash. Rev. Code Ann., tit. 10, §46.090: "The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order any criminal prosecution to be dismissed; but in such case the reason for the dismissal must be set forth in the order, which must be entered upon the record. No prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in this section."

Wyoming, Wyo. Comp. Stat. Ann., tit. 7, ch. 9, §7-198: "No indictment or information shall be nol-prossed, except by order of the court on the motion of the prosecuting attorney, and such motion must be in writing, and the reasons therefor must be stated in such motion and read in open court, before such order is made.

7. Several other states include some mention of *nol. pros.* in their statutory schemes.

Connecticut: G. S. 54-143: "The costs of prosecution shall not be imposed against any person convicted of crime; provided nothing in here shall prevent the dismissal of a complaint or information or the entry of a nolle prosequi upon the payment of a sum of money in such amount as is fixed by the court. . . ."

G. S. 54-90: "Whenever any criminal case is nolled in the superior court or in the court of common pleas, the clerk of the court shall make a record of such nolle."

G. S. 54-51: "Any person who gives information leading to the arrest and conviction of any person for theft of any motor vehicle, mule, ass, cattle, horse or poultry shall receive a reward of such sum, not exceeding one hundred dollars, as the court in which such conviction is had or as the presiding judge of such court may determine, which shall be paid by the comptroller upon certification by the clerk of such court of the amount so determined. The nolle of such complaint upon the payment of any sum of money shall be deemed a conviction within the meaning of this section."

G. S. 29-15: "When any person, having no prior criminal record, whose fingerprints and pictures are so filed has been found not guilty of the offense charged, or has had such charge nolled, his fingerprints, pictures and description shall, upon his request, be returned to him not later than sixty days after the finding of not guilty or after such nolle."

Florida: Note: G. S. 142.09-142.13 require the county to bear the costs of witness fees, etc., to keep records and accounts if a case is *nol. prossed.* There is no mention in the statutes of how or when the *nol. pros.* may be taken or by whom.

Illinois: Ann. Stat. §§34-8, 9, 14, 16, 17, 28 all refer to who shall bear the costs of the proceedings and keep accounts when a case is *nol. prossed.*

Louisiana: Rev. Stat. §15:327: "A nolle prosequi is a declaration made by the district attorney and filed in open court, that he will no longer prosecute a particular indictment or some offense in such indictment charged."

Rev. Stat. §15:328: "A nolle prosequi simply discharges a particular indictment or part thereof, and is no bar to a subsequent prosecution for the offense as to which the nolle prosequi was entered."

Rev. Stat. §15.329: "The exercise of the power to enter the nolle prosequi is a matter that shall be subject to the sound discretion and control of the district attorney, and in order to exercise that power he shall not have to obtain the consent of permission of the court."

Rev. Stat. §15:330: "After the indictment has been read to the jury, the district attorney is without authority to enter a nolle prosequi over the objection of the accused."

Rev. Stat. §15:331: "After conviction the district attorney can enter a nolle prosequi only in the following cases:

(1) When a new trial has been granted or a motion in arrest of judgment has been sustained;

(2) When the indictment is so defective that no judgment can be pronounced on the verdict;

(3) When the accused has been found guilty on several counts of the indictment, the district attorney may enter a nolle prosequi as to

such of these counts as are fatally defective and demand sentence on the good counts."

Maryland: Art. 41, §52: "No nolle prosequi shall be granted by the Governor but on condition that the cost of prosecution shall be paid by the person applying for the same."

Massachusetts: C. 277, §70A: "Except as otherwise provided by law, a nolle prosequi entered by a district attorney or assistant district attorney in a criminal case shall be accompanied by a written statement, signed by the district attorney or assistant district attorney making such entry, setting forth the reasons for such disposition. Said statement shall be filed with the pleadings."

Missouri: §558.170: "Every prosecuting attorney or assistant prosecuting attorney, or other person acting for the time being as such officer, who shall, in pursuance of any corrupt agreement with any defendant or defendants, or other person or persons, enter a nolle prosequi as to any indictment or dismiss or fail to prosecute, as provided by law, any indictment . . . wherein the state or any county shall be a party, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in a sum not less than five hundred dollars, or imprisoned in a county jail not less than three months."

Nebraska: §25-1323: "No complete record shall be made (1) in criminal prosecutions where the indictment has been quashed or where the prosecuting attorney shall have entered a nolle prosequi on the indictment. . . ."

New Mexico: §41-11-9: "In all criminal cases a nolle prosequi cannot be entered after any testimony has been introduced for the defendant."

Vermont: Vt. Stat. Ann. 13:6555: "If, upon the trial of a person charged with an offense, the facts given in evidence amount in law to a greater offense than the one charged, such person shall not by reason thereof be acquitted, but the court, in its discretion, may allow a nolle prosequi to be entered in order that he may be prosecuted for the greater offense."

8. Several states make no mention whatsoever of *nol. pros.* in their statutory schemes.

Alaska, Arizona, Kansas, Maine, New Hampshire, New Jersey, Rhode Island, South Carolina, Tennessee, Wisconsin, West Virginia.

9. North Carolina is the only state which includes the *nol. pros.* "with leave" in its statutory scheme.

G. S. 15-175.

10. Several of the states that ratified the original Constitution included a provision for 'speedy trial' in their own constitutions.

New Jersey: Act 1795, Patterson's Rev. Laws, N. J. 1703-99, p. 168; Maryland: Act 1809, c. 125, §7; South Carolina: Eng. Act, *State* v. *Spergen*, 1 McCord 563 (1822); *State* v. *Stalnaker*, 2 Brev. 44 (1806); Delaware: Act 1793, c. IV, s. 3; Pennsylvania: Act Feb. 18, 1785, Sec. 3, *Commonwealth* v. *Sheriff and Gaoler of Allegheny County*, 16 Serg. + R. 304; New York: Act 1801, c. 65, s. 6; Rhode Island: s. 11, Habeas

Corpus Act p. 237; Rev. Public Law of Rhode Island 1798; Virginia: Act 1786, c. 57; *Ex parte Joseph Santee*, 2 Va. Cas. 363; Georgia: Eng. Act; *State* v. *Maurignos*, T. U. P. Charlt. 24 (1805; Massachusetts: Act 1784, c. 72, s. 13.

11. Many of the early acts and state decisions provided that trial had to be held within a specified time period or the indictment dismissed.

State v. *Phil*, 1 Stew. 31 (Ala. 1827); *State* v. *Maurignos*, T. U. P. Charl. 24 (Ga. 1805); *State* v. *Stalnaker*, 2 Brev. 44 (S. C. 1806).

12. Some courts felt that the accused should be discharged for any delay unless that delay had been caused by the accused.

State v. *Phil*, supra; *State* v. *Maurignos*, supra; *State* v. *Sims*, 1 Tenn. 253 (1807); *State* v. *Stalnaker*, supra; *Ex parte Joseph Santee* (dissent), supra; *Commonwealth* v. *Sheriff and Gaoler of Allegheny County*, supra.

13. Most of the federal cases have gone off on the ground that the accused has waived his right to a speedy trial unless he specifically demanded it.

MacKnight v. *United States*, 263 F. 832 (1st Cir. 1920); *Gerardino* v. *People of Puerto Rico*, 29 F. 2d 517 (1st Cir. 1928); *United States* v. *Rumrich*, 180 F. 2d 575 (2d Cir. 1950); *United States* v. *Holmes*, 168 F. 2d 288 (3d Cir. 1948); *Hart* v. *United States*, 183 F. 368 (6th Cir. 1910); *Carter* v. *State of Tennessee*, 18 F. 2d 850 (6th Cir. 1927); *Worthington* v.

United States, F. 2d 154 (7th Cir. 1924); *O'Brien* v. *United States*, 25 F. 2d 90 (7th Cir. 1928); *Bayless* v. *United States*, 147 F. 2d 169 (8th Cir. 1945); *Phillips* v. *United States*, 201 F. 259 (8th Cir. 1912); *Collins* v. *United States*, 20 F. 2d 574 (8th Cir. 1927); *Poffenbarger* v. *United States*, 20 F. 2d 42 (8th Cir. 1927); *Shepard* v. *United States*, 163 F. 2d 974 (8th Cir. 1947); *Daniels* v. *United States*, 17 F. 2d 339 (9th Cir. 1927); *Collins* v. *United States*, 157 F. 2d 409 (9th Cir. 1946); *Danziger* v. *United States*, 161 F. 2d 299 (9th Cir. 1947); *Pietch* v. *United States*, 110 F. 2d 817 (10th Cir. 1940); *Fowler* v. *Hunter*, 164 F. 2d 668 (10th Cir. 1947); *Morland* v. *United States*, 193 F. 2d 297 (10th Cir. 1951); *Ex parte Pickerill*, 44 F. Supp. 741 (N. D. Tex. 1942).

14. A great majority of the federal cases recognize expressly or impliedly that if a defendant does not waive his right to a speedy trial by failing to ask for it, he may, in a proper case, be entitled to a discharge because of unreasonable delay in bringing his case to trial.

MacKnight v. *United States*, supra; *Geraridino* v. *People of Puerto Rico*, supra; *United States* v. *Holmes*, supra; *Hart* v. *United States*, supra; *Carter* v. *State of Tenn.*, supra; *Worthington* v. *United States*, supra; *O'Brien* v. *U. S.*, supra; *Bayless* v. *U. S.*, supra; *Phillips* v. *U. S.*, supra; *Collins* v. *U. S.* (9th Cir.), supra; *Poffenbarger* v. *U. S.*, supra; *Collins* v. *U. S.* (8th Cir.), supra; *Danziger* v. *U. S.*, supra; *Pietch* v. *U. S.*, supra; *Morland* v. *U. S.*, supra; *Ex parte Pickerill*, supra; *Beavers* v. *Haubert*, 198 U. S. 77 (1905); *Kong* v.

United States, 216 F. 2d 665 (9th Cir. 1954); *Germany* v. *Hudspeth*, 209 F. 2d 15 (10th Cir. 1954); *D'Aquino* v. *United States*, 192 F. 2d 338 (9th Cir. 1951); rehearing denied 203 F. 2d 390; *United States* v. *McWilliams*, 163 F. 2d 695 (D. C. Cir. 1947); *Nolan* v. *United States*, 163 F. 2d 768 (8th Cir. 1947); *Story* v. *Hunter*, 158 F. 2d 825 (10th Cir. 1947); *Frizzell* v. *United States*, 2 F. 2d 398 (D. C. Cir. 1924).